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IN THE

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OCTOBER TERM, 1984

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC. and NORTH CAROLINA MOTOR CARRIERS ASSOCIATION, INC. and NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit (Unit B)

MOTION OF NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE AND DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

DANIEL J. SWEENEY*
JOHN M. CUTLER, JR.
MCCARTHY, SWEENEY & HARKAWAY, P.C.
1750 Pennsylvania Ave., NW
Washington, DC 20006
(202)393-5710

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The National Small Shipments Traffic Conference and the Drug and Toilet Preparation Traffic Conference (hereinafter collectively "Shipper Conferences") hereby respectfully move for leave to file the attached brief supporting affirmance. This motion is necessitated by the refusal of Petitioners to consent to the filing of this brief.

These Shipper Conferences are non-profit membership corporations which have for many years represented their members before the Interstate Commerce Commission, various state commissions and in the courts with

respect to transportation issues. Conference officials have also testified before Congress and state legislatures on transportation subjects. Both Conferences represent their members, which range from private individuals to major corporations, in their capacities as shippers of freight, with special emphasis on members' interests as shippers via regulated motor carriers. The National Small Shipments Traffic Conference focuses in its activities on issues affecting small or less-than-truckload (LTL) shipments, a segment of the transportation market which is dominated by large carriers with terminal facilities. The Drug and Toilet Preparation Traffic Conference represents most of the major shippers of drugs, medicines and toilet articles.

The interest of these Shipper Conferences in the instant case is not academic or indirect. Members of these Conferences are in the front lines of the controversy presented herein, in that, as consumers of transportation services, they must pay the collectively set intrastate freight rates which have been found to violate the antitrust laws. As representatives of the public victims of the intrastate freight rate price fixing which petitioners seek to immunize, these Conferences bring to this case a perspective which is shared by no other party and by no known *amicus*.

Through the attached brief, these Shipper Conferences seek to present to the Court new facts and arguments relating to the antitrust immunity issues, including the public policy context in which this case should be considered. For example, it has been suggested that collective ratemaking is in the public interest, although the asserted benefits are more in the nature of the enhanced convenience for rate retrieval than reduced rates for the shipping public. See Brief of Petitioner SMCRC at p. 37.

These Conferences' members include many transportation professionals who have actually participated as shippers' representatives in public meetings sponsored by the Petitioner rate bureaus. These Conferences, which represent active members of the shipping public, are firmly opposed to antitrust immunity for intrastate collective ratemaking. In our view, state commissions too often "rubber stamp" general increases of intrastate freight rates which have been collectively set by motor carriers.

Nor is our opposition limited to collective ratemaking in intrastate commerce. Judge Clark, in his dissent below, criticized the Respondent for opposing in intrastate commerce an activity which is permitted in interstate commerce. However, there have been significant developments reducing the ability of motor carriers to set interstate freight rates collectively, and these Shipper Conferences are in the forefront of efforts to eliminate what remains of antitrust immunity for interstate collective ratemaking. This Court should be aware of these developments in considering this important case.

Wherefore, these Shipper Conferences move that the attached *amici brief* be accepted for filing by this Court.

Respectfully submitted,

DANIEL J. SWEENEY*
JOHN M. CUTLER, JR.
McCARTHY, SWEENEY &
HARKAWAY, P.C.
1750 Pennsylvania Ave., NW
Washington, DC 20006
(202)393-5710

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Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit (Unit B)

BRIEF *AMICI CURIAE* NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE AND DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE IN SUPPORT OF AFFIRMANCE

DANIEL J. SWEENEY*
JOHN M. CUTLER, JR.
McCARTHY, SWEENEY & HARKAWAY, P.C.
1750 Pennsylvania Ave., NW
Washington, DC 20006
(202)393-5710

**Counsel of Record*

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BRIEF *AMICI CURIAE*

NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE AND DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE IN SUPPORT OF AFFIRMANCE

INTEREST OF *AMICI CURIAE*

The members of *amicus*, the National Small Shipments Traffic Conference, include individuals, small companies and major corporations which ship millions of tons of freight by motor carriers each year. The Conference is a shipper-member association, with special emphasis on shipments in small or less-than-truckload (LTL) quantities. *Amicus*, the Drug and Toilet Preparation Traffic Conference, includes most major manufacturers of drugs, medicines and toiletries. They participate in the Conference in their capacity as shippers of freight. Members of both Shipper Conferences are a cross-section of those who ship freight by motor carrier members of the rate bureau petitioners in this case and pay collectively set intrastate freight rates.

The rate bureau petitioners do not deny that collective intrastate ratemaking by motor carriers constitutes price fixing which would violate the antitrust laws in the absence of immunity from the application of these laws. As a result of this price fixing, the rate bureau petitioners and their motor carrier members charge the public, including members of these Shipper Conferences, higher intrastate freight rates than would be set by motor carriers acting independently of one another. Continued antitrust immunity for such price fixing is not justified by considerations of law or policy. These Shipper Conferences have long opposed antitrust immunity for collective motor carrier ratemaking in interstate as well as intrastate commerce, and urge this Court to affirm the decision of the court of appeals below.

Amici wish to make it clear that their arguments arise in the regulatory context of this case, and that certain legal and policy positions espoused here may not be equally applicable to situations involving state regulation of industries other than motor carrier transportation, as discussed in the brief of *amicus curiae* Edison Electric Institute.

SUMMARY OF ARGUMENT

These Shipper Conferences file this brief as *amici curiae* to support affirmance of the decision below. As customers of the trucking companies, they are opposed to collective ratemaking because such rates are generally higher than individually made rates and tend to chill individual ratemaking.

The scheme of intrastate ratemaking under review allows carriers at their option to join rate bureaus and thereby to make rates collectively. They are neither bound to join the bureau nor to adhere to the bureau-set rates, inasmuch as they have the right to publish other rates individually.

Whether or not *Parker* v. *Brown*, 317 U.S. 341 (1943) and successor cases can be read as extending antitrust immunity only to activities directed by "compulsory" state action, there is simply not enough here to warrant raising the shield of antitrust immunity for what is concededly price-fixing in violation of the antitrust laws. The state does not require that the carriers join the rate bureau, nor does it require the carriers to abide by the rate bureau's rates. And, although the state commission later reviews and approves the rates as not being unreasonable, this limited approval after-the-fact does not retroactively confer antitrust immunity. *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945).

A *caveat* is important here. While the narrow question before the Court is whether the state statutory scheme in place creates an antitrust immunity, the truckers are already pressing for new "mandatory" state legislation to vitiate the effect of the decision below. But the requirement of mandatory state action does not mean that all rates in the state would have to be made collectively. For ratemaking to attain antitrust immunity, a state has the option of mandating that only certain rates be made collectively. For example, new state legislation meeting the *Parker* test could provide only that the carriers would be required to join rate bureaus to set the maximum rates to be charged. All other rates could still be made by carriers individually outside the collective ratemaking forum. Thus, the carriers would be left free to exercise their managerial discretion to publish lower individual rates or discounts. This option is essential, or else the shippers in the future would be faced with higher rates and less competition than is available under the present intrastate scheme where collectively made rates and individually made rates are available.

ARGUMENT

I. The State Action Doctrine Does Not Immunize Collective Intrastate Motor Carrier Ratemaking

In *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532 (5th Cir. Unit B 1983), the United States Court of Appeals, sitting *en banc*, rejected the argument of the rate bureaus that the state action doctrine immunizes collective intrastate motor carrier ratemaking from the application of the antitrust laws. The court noted that, while the laws of Mississippi, Alabama, Georgia, Tennessee and North Carolina permit motor carriers to discuss and agree on the intrastate

freight rates they will charge—an activity which is now conceded to amount to price fixing in violation of the antitrust laws, unless immunized under the state action or *Noerr-Pennington* doctrines[1]—motor carriers in those states retain express permission *not* to engage in price fixing.

In light of such optional rate-setting action, the court held that the exercise of preclusive state sovereignty necessary to prevent application of the federal antitrust laws was absent. The court adopted (702 F.2d at 542) the decision of a panel of the court, 672 F.2d 469, 476-81, rejecting the petitioners' *Noerr-Pennington* and Sherman Act arguments, and affirmed the decision of the district court[2] granting the Government's motion for an injunction against continued intrastate collective ratemaking by the rate bureaus in violation of the antitrust laws.

Before turning to a discussion of the court's decision on the state action issue, there are two issues important to the state action analysis which were not decided by the court. First, the court of appeals voted to rehear the case *en banc* to consider two issues. The first was "whether a private party may avail itself of the state action exception to federal antitrust laws only if the state compels it to perform the disputed actions," and the second was "whether, if state compulsion is not necessary, the state

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[1] The leading cases establishing the *Noerr-Pennington* doctrine are *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965).

[2] *United States* v. *Southern Motor Carriers Rate Conference, Inc.*, 467 F.Supp. 471 (N.D. Ga. 1979), reprinted in Petition for Certiorari, Appendix (hereinafter "Pet. App.") at 1a.

policies at issue here were sufficiently clearly articulated and affirmatively expressed for the state action exception to apply." 702 F.2d at 534. Since the court decided that state compulsion is necessary, it did not reach the second issue. While we believe the compulsion question was correctly decided, we would point out that, if this Court holds otherwise, the result should be a remand to consider the issue not reached by the court of appeals.

It should be noted next that the Government, before the court of appeals, agreed with the rate bureaus that each state actively supervises the collective ratemaking process. The court of appeals, therefore, did not examine whether this part of the two-part test established by this Court in *California Retail Liquor Dealers Ass'n.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) had been met. While we support the position of the Government here in most respects, we disagree with the Government's suggestion that there is adequate state supervision of intrastate collective ratemaking. Therefore, it is the position of these Shipper Conferences that collective intrastate ratemaking would not be immune from the antitrust laws even if the states in question were to change their laws to compel collective ratemaking.[3]

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[3] In this regard, there are signs of a backlash in some states against the court of appeals' decision here. Carriers in a number of states, sometimes with the support of state regulatory agencies, are seeking changes in state law which would go so far as to eliminate any right of independent action by motor carriers, thus compelling all carriers to charge only rate bureau-set rates. These Shipper Conferences view this development with grave concern, since, in our view, independent action filings produce some limited moderation of the adverse economic impacts of collective ratemaking. Indeed, such legislative proposals go far beyond the reach of *Parker*, as the states have the option of mandating that the carriers' maximum rates be set in bureaus, leaving the carriers free to set lower rates individually.

The decision of the court of appeals was not unanimous. Judge Hill, in a lengthy opinion, dissented from the majority's decision on the state action issue. Judge Clark, one of the judges who joined Judge Hill's state action dissent, also criticized the Justice Department for inconsistency in challenging intrastate collective ratemaking, in view of the fact that interstate collective ratemaking remains lawful. (As will be seen, Judge Clark's criticism is not well taken, since the Justice Department is in fact advocating the end of all collective interstate ratemaking by motor carriers.) However, these dissents were limited to the majority's position on the state action issue. No judge dissented from the majority's rejection of the arguments that collective intrastate ratemaking is immunized under the *Noerr-Pennington* doctrine or that such ratemaking does not violate the Sherman Act (an argument which has evidently been abandoned by petitioners in this Court).

Moreover, even in his dissent on the state action issue, Judge Hill had no kind words for the existence of a state action exemption to federal antitrust law (702 F.2d at 542), and he went on to make the following concession:

> The principal flaw in the majority's position is not that it misinterprets the line of cases developing the doctrine of state action immunity. The court's analysis leading to its conclusion that compulsion is an essential element of immunity for a private defendant certainly is plausible. (702 F.2d at 543)

Indeed, as to only three of the five states in question did Judge Hill express the belief that antitrust immunity should be found, even under his interpretation of the state action doctrine. 702 F.2d at 548.

Judge Hill's dissent turned on his disagreement with the majority's interpretation of *Midcal*, *supra*, which he

described as "presumptuous at worst, and unsound policy as it pertains to the facts of this case at best" (702 F.2d at 542).

Judge Hill does not deny the potential significance of state compulsion of private behavior for purposes of state action analysis. The essence of his disagreement with the majority is his belief, based on his reading of *Midcal*, that compulsion, by itself, is neither "necessary nor sufficient" for state action immunity. 702 F.2d at 544, quoting Areeda, Antritrust Law ¶ 212.5 at 62 (Supp. 1982).

Midcal involved a California program under which wine producers and wholesalers were required by statute to file price schedules or fair trade contracts, and were prohibited from charging prices other than those set forth in those schedules and contracts. In its decision in *Midcal*, this Court reviewed its earlier decisions establishing and developing the state action doctrine, beginning with *Parker* v. *Brown*, 317 U.S. 341 (1943), and concluded:

> These decisions establish two standards for antitrust immunity under *Parker* v. *Brown*. First the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy," second, the policy must be "actively supervised" by the State itself. (445 U.S. at 105, citations omitted.)

The Court went on to hold that while the California program met the first test for antitrust immunity, the second requirement, "active state supervision," was not present, and state action immunity was therefore denied. In comments which apply equally well to this case, the Court said "The State simply authorizes price setting and enforces the prices established by private parties" (445 U.S. at 105), and observed that "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." (445 U.S. at 106.)

Since state compulsion was present in *Midcal*, state action immunity was denied on the grounds that compulsion is not *sufficient*, by itself, to immunize "what is essentially a private price-fixing arrangement."[4] Thus even a compulsory program of intrastate collective motor carrier ratemaking would be vulnerable to antitrust challenge on similar grounds.

However, there is no support in this Court's *Midcal* decision for Judge Hill's statement that state compulsion is not *necessary* to immunize private price fixing under the state action doctrine. It is true that the Court's two-part test does not explicitly mention compulsion, but *Midcal* arose out of an action brought to enjoin the State of California from enforcing its statutes, and did not involve a challenge to voluntary price-fixing by private parties under a permissive arrangement, as the instant case does.

The significance of this distinction was illustrated in this Court's recent decision in *Hoover* v. *Ronwin*, ___ U.S. ___, 104 S.Ct. 1989 (1984), in which the disagreement between the majority and the dissent turned on whether the real party in interest was the Arizona Supreme Court or that court's agent, the Committee on Examinations and Admissions. The decision in *Hoover* v. *Ronwin* makes it clear that the *Midcal* test is not of universal applicability. The Court held that "Where the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of 'clear

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[4] See also *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), in which state action immunity for Detroit Edison's free light bulb program was denied even though that program was embodied in Detroit Edison's tariffs, with which the utility was required by state law to comply.

articulation' and 'active supervision' " (104 S.Ct. at 1996). On the other hand,

> in cases involving the anti-competitive conduct of a nonsovereign state representative the Court has required a showing that the conduct is pursuant to a "clearly articulated and affirmatively expressed state policy" to replace competition with regulation. *Boulder*, *supra*, at 54, 102 S.Ct., at 842. The Court also has found the degree to which the state legislature or supreme court supervises its representative to be relevant to the inquiry. See *Midcal Aluminum*, *supra*, at 105, 100 S.Ct., at 943; *Goldfarb*, *supra*, at 791, 95 S.Ct., at 2015. (104 S.Ct. at 1995).

Although the Court did not go so far, the next stop in the progression from sovereign act by the state itself (as in *Hoover* v. *Ronwin*) to "anti-competitive conduct of a non-sovereign state representative" (as in *Midcal*), would be anticompetitive conduct engaged in by private parties. Where, as here, (1) such conduct is engaged in or not at the option of the private parties under a permissive regulatory arrangement and (2) where there is no indication that the "state legislature or supreme court supervises its representative," (*i.e.*, the state commissions which oversee this permissive arrangement), it is difficult to believe that the state action doctrine could be found to apply.

As the majority decision of the court of appeals in this case points out, the two-part test in *Midcal* must be interpreted in light of the facts of the *Midcal* case itself, and in light of the prior state action decisions of this Court from which the *Midcal* test was developed. The court of appeals majority explains at length and in persuasive detail why a requirement of compulsion for state immunization of private action from the antitrust laws is

consistent with *Midcal* and flows naturally from the decisions of this Court leading up to *Midcal*. See 702 F.2d at 538-41.

Indeed, a key question confronting Judge Hill (and other parties who argue that state compulsion is not only not sufficient but is not necessary) is whether, in any decision of this Court which found state action immunity applicable to a nonsovereign act by a state agency or subdivision or a private party, compulsion was absent? If so, it might be argued that compulsion is not a necessary component of the state action doctrine.

No such cases are cited by Judge Hill in his dissent, or by the rate bureau petitioners or petitioner National Association of Regulatory Utility Commissioners in their briefs, and none exist. Of this Court's cases developing the state action doctrine, only three decisions (other than *Hoover* v. *Ronwin*, discussed above) found the challenged behavior to be immunized under the state action doctrine. In all three cases—*Parker* v. *Brown*, *supra*, which concerned a mandatory prorate program imposed on growers by the State of California, *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), which involved a prohibition by the Arizona Supreme Court against lawyer advertising, and *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978), involving the requirement of California state approval for new automobile dealerships—compulsion was in fact present.

Reduced to their essence, the state statutes in the instant case provide the alternatives that carriers may either make rates collectively or they may choose to make rates individually without such collusion. A state could enact a similar statute covering all pricing by all companies in all industries in the state. Can a state so simply repeal the federal antitrust laws from application within its boundaries? We think not.

II. The *Noerr-Pennington* Doctrine Does Not Immunize Collective Intrastate Motor Carrier Ratemaking

The *Noerr-Pennington* arguments of the petitioners require little in the way of a response. In the original district court decision in this case, the court stated "The parties have cited no cases in which courts have invoked *Noerr-Pennington* to immunize price fixing among competitors" (467 F.Supp. at 485). Now, many briefs later, the petitioners have still cited no such cases. Precedent and policy are against petitioners' *Noerr-Pennington* arguments.

Moreover, *Georgia* v. *Pennsylvania R. R.*, 324 U.S. 439 (1945) is squarely against petitioners on this point. In that case, this Court held collective interstate ratemaking by railroads to be price-fixing in violation of the antitrust laws, in spite of the fact that the rates were reviewed and approved by the Interstate Commerce Commission.

III. Policy Considerations Do Not Favor Immunity For Collective Intrastate Motor Carrier Ratemaking

It cannot be denied that the policies furthered by the antitrust laws—economic efficiency and prices set by competition in the marketplace—are important ones. The influence of the antitrust laws is pervasive. In the event of a conflict between those laws and other federal laws, the antitrust laws give way only if Congress clearly and unequivocally expressed such an intention. Repeals by implication are not favored. *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973).

Moreover, it has never been suggested that the price-fixing in which motor carriers engage under the auspices of the rate bureau petitioners is intended to set low or minimal uniform rates. The experience of these Shipper

Conferences is that when rates are published by individual carriers acting independently of the rate bureaus, those rates are almost always *lower* than the collectively set rate for similar service. It is our firm belief that, if collective intrastate ratemaking were abolished, freight rates charged by motor carriers to the shipping public would come down. This belief finds support in a survey of the results of the first year of intrastate motor carrier deregulation in Florida. See Freeman, A Survey of Motor Carrier Deregulation in Florida: One Year's Experience, ICC Practitioners' Journal, Nov-Dec. 1982.

Congress clearly agrees that the benefits of collective motor carrier ratemaking warrant reexamination. To this end, Congress established, in the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793, a Motor Carrier Ratemaking Study Commission, and ordered it to "make a full and complete investigation and study of the collective ratemaking process for all rates of motor common carriers and upon the need or lack of need for continued antitrust immunity therefor" (Motor Carrier Act of 1980, Section 14(b)(2), 94 Stat. 806). These Shipper Conferences, along with many other parties, presented testimony before the Commission. In its report entitled Collective Ratemaking in the Trucking Industry, submitted June 1, 1983, the Motor Carrier Ratemaking Study Commission recommended to Congress the complete abolition of antitrust immunity for collective motor carrier ratemaking of interstate rates.

Although this recommendation has not yet been implemented in full, the Motor Carrier Act of 1980 itself provided for a major reduction in antitrust immunity for collective interstate ratemaking. Section 14(b)(3)(D) of the Motor Carrier Act amended the Interstate Commerce Act so as to eliminate, with certain exceptions, antitrust immunity for collective ratemaking as to single-

line rates (*i.e.*, rates applicable to movements in which the transportation from origin to destination is provided by a single motor carrier) effective July 1, 1983. See 49 U.S.C. § 10706(b)(3)(D).

Thus, partial withdrawal of antitrust immunity for interstate ratemaking has already taken place; and the complete withdrawal of antitrust immunity for collective interstate ratemaking is only a matter of time. Events have already overtaken the separate dissent of Judge Clark to the decision of the majority of the court of appeals in this case. In that dissent, he complained that petitioner Southern Motor Carriers Rate Conference could publish collectively set rates with the ICC for movements of carpet from Rome, Georgia, to Nashville, Tennessee, but would not be able, under the majority's interpretation of the law, to publish collectively set intrastate rates for movements from Rome, Georgia, to Macon, Georgia, approximately the same distance. 702 F.2d at 548-49. Assuming the rates in question are single line rates (as shorthaul shipments are usually single line), they may no longer be collectively set for the interstate movement.

What public policies have been cited in support of antitrust immunity for collective intrastate ratemaking, in the face of the foregoing arguments against antitrust immunity?

Petitioner Southern Motor Carriers Rate Conference contends (brief at 34-35) that "The States have defended their regulatory programs because these programs could not handle the flood of independent actions which the Final Judgment herein would create." This is belied by the fact that there are literally thousands of individual carriers' tariffs filed with the Interstate Commerce Commission. If it can handle such a "flood" of tariffs covering

the continental United States, then a state agency can easily handle the independent tariff filings of local carriers.

It is also contended by petitioners that the compulsion test eliminates the last element of competition—independent action filings—from intrastate ratemaking. See Brief of petitioner National Association of Regulatory Utility Commissioners at p. 9, and Judge Hill's dissent below, 702 F.2d at 546. We have expressed our concern over this possibility. It is the expectation of these Shipper Conferences that if the state-compulsion requirement forces the states to reconsider their policies on collective intrastate ratemaking, most states will follow the federal trend away from antitrust immunity. In any event, this Court should make it clear in its opinion that if state-mandated collectively-made rates are to be immunized, then carriers may be left free to publish individual discount tariff items. In other words, state-mandated collectively set rates can coexist alongside individual carrier-made rates which are not collectively set.[5]

IV. Conclusion

Immunity from the antitrust laws should not be extended lightly. The policy behind the laws is to preserve the benefits of free competition. The limited state action present in this case simply does not warrant an immunity from the antitrust laws. The states neither initiate the

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[5] A state which sets mandatory prices on raisins may elect not to set the prices of oranges. By the same token, a state may elect to mandate collective ratemaking on the maximum rates carriers may charge, while simultaneously allowing carriers to publish individually their own competitive rates or discounts.

bureau rates nor require that the carriers observe them.[6] Thus, the carriers have not been placed in the classic position, between a rock and a hard place, which would warrant extricating them by a grant of immunity. They can extricate themselves simply by staying out of the rate bureau and, therefore, can choose not to violate the anti-trust laws. For all the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

Daniel J. Sweeney, *Attorney for*
National Small Shipments
Traffic Conference, Inc.
Drug and Toilet Preparation
Traffic Conference, Inc.

DANIEL J. SWEENEY
JOHN M. CUTLER, JR.
MCCARTHY, SWEENEY &
HARKAWAY, P.C.
1750 Pennsylvania Ave., NW
Washington, DC 20006

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[6] Based upon the part of the North Carolina Public Utilities Act shown at page 2 of Petitioners brief, *viz.*, Section 62-152.1(b), it might be inferred that the rate bureau proposes a set of rates which is then "fixed" by the Commission as the single uniform set of rates throughout the state. However, Subsection (e) of Section 62-152.1 provides that any carrier in a rate bureau may publish its own rates by "independent action" after the rate bureau sets rates for the group. And there are many such rates in effect today.